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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-393

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Petitioner, pursuant to the authority granted by Rule 24(4), Rules of the Supreme Court, hereby files his Reply Brief addressed to arguments first raised in the Brief for the United States in Opposition.

ARGUMENT

I.

The concession relating to overt act (j), made in argument before the Court of Appeals is misstated by the Government.

The Government in a footnote (Br. 6) makes the bold, unequivocal statement that the Petitioner erred in stating that the Government's counsel had abandoned the last overt act (j) alleged in the conspiracy count during oral argument before the Court of Appeals. It is claimed that Government counsel stated that the Government is relying on overt act (i), and if that act is insufficient as a matter of law, then overt act (j) is also insufficient. We appreciate the concession, but nevertheless deplore that there is a difference of opinion relating to what was said. We are referring to the footnote merely to bring to the Court's attention that the Government's assertion of alleged error on the part of Petitioner is disputed. Nevertheless, the Government has conceded, albeit indirectly, that overt act (j) cannot stand by itself if overt act (i) is insufficient.

II.

The Government has misconstrued Barnes v. United States.

The Government, while conceding a conflict among the Circuits relating to interpretation and application of *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), erroneously interpreted the recent case of *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16, 93 S.Ct. 2357, 37

L.Ed.2d 380 (1973) as reaffirming the concurrent sentence rule as a matter of proper judicial administration. It is true that in the footnote, and without further comment, this was said:

> "Although affirmance of petitioner's conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, *Benton* v. *Maryland*, 395 U.S. 784 (1969), we decline as a discretionary matter to reach these issues. Cf. *United States* v. *Romano*, supra, 382 U.S. at 138."

However, there is no indication that this statement stems from full argument on the question, or that the conflict among the circuits was ever brought before the Court. There is no indication that Barnes had made the continued usefulness and vitality of the doctrine the central core of the appeal. It is difficult to believe that this comment should be construed to reach and dispose of this statement made by Justice Marshall in *Benton*:

> "* * * A stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for post-conviction relief. Because of our disposition of this case, we need not reach this question." 395 U.S. at 793, footnote 11, and 89 S.Ct. at 2062.

It is of some significance that *United States* v. *Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965), cited in the *Barnes* footnote, antedates *Benton* by four years, and makes no mention of possible abolition of the doctrine of concurrent sentences, or the effect of adverse collateral legal consequences.

And, finally, addressing ourselves to the Government's contention that our reliance on *Sibron* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), is misplaced, we suggest that the Court has considered *Sibron* as one of the cases casting doubt on the continuing validity of the concurrent sentence doctrine. In *Benton*, the Court directed this question to be answered: "Does the 'concurrent sentence doctrine' enunciated in *Hirabayashi* v. *United States*, 320 U.S. 81, 105, 63 S.Ct. 1375, 87 L.Ed. 1774, and subsequent cases, have continuing validity in the light of such decisions as [other cases cited] and *Sibron* v. *New York*, 392 U.S. 40, 50-58, [20 L.Ed.2d 917, 927-932, 88 S.Ct. 1889]?"[1]

Barnes does not answer this question. It is still an open one.

III.

The Government has misrepresented the status of its alleged tax claim against the Petitioner.

Aliunde the record, the Government asserts that it still does not know the income tax liability of the Petitioner. This does not comport with the facts. On October 16, 1973, the Government filed a civil action against the Petitioner claiming a tax liability of $474,825.00 plus interest and costs.[2] While the Petitioner claims nothing is owed, the Government is in error in making this statement (Br. 11).

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1. 395 U.S. at 787.

2. *United States* v. *Tager*, in the United States District Court for the Western District of Missouri, Civil Action No. 73-CV-554-W-2.

IV.

The Government has acted unfairly and in derogation of Petitioner's rights in referring to another unresolved pending case of Petitioner in order to avoid the impact of the collateral consequences rule.

We strenuously object to the tactics of the Government in referring to another case before the Court involving the Petitioner (Br. 17).[3] It theorizes that the collateral consequences rule is of little help to Petitioner since he has been convicted of five felonies instead of two. The pre-judging of the merits of the other case is completely unjustified, is a tactic of doubtful integrity, and should be ignored by the Court. The question of the continuing validity of the concurrent sentence doctrine should not be hinged to the merits of another unresolved case, nor do the Government's assertions answer the vital question of whether any person should stand convicted of an invalid criminal judgment.

V.

The Government has deliberately misconstrued the impact and consequences of conflicting decisions among the Circuits.

The Government's arguments relating to the conflict among the circuits deserves comment. It adheres to the rule of discretion, but admits that some circuits are more prone to ignore the concurrent sentence rule than others. The Government's concession is laudable, although a reading of the cases cited in Petitioner's Petition reveals that the concession is rather modestly put since the various circuits

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3. *Tager* v. *United States*, October Term, 1973, No. 73-694.

apply the rule of discretion over an extremely wide spectrum, that is, liberally, with a great deal of caution, or always. The circuits have also opined that the doctrine of concurrent sentences is either dead, very much alive, or somewhere in between.

We suggest that the Government's concession impels full reconsideration of the doctrine.

VI.

The Government's defense of Instruction No. 19 is insufficient.

The Government appears to recognize the insufficiency of Instruction No. 19 (Pet. 39-40), and the obvious fact that the jury was not instructed or permitted to make any findings relating to whether overt acts (i) and (j) were in furtherance of the conspiracy or efforts to conceal it.[4] This appears to be fatal error under *Grunewald* v. *United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). In an effort to blunt the thrust of *Grunewald*, the Government asserts that the Petitioner had failed to include another instruction (Br. 14), and conveys the impression that only part of Instruction 19 was set out by the Petitioner. This is not true. The instruction which followed No. 19 was a complete and separate instruction, and advised the jury on the law relating to withdrawal from a conspiracy. It had nothing to do with whether or not overt acts (i) and (j) related to acts in furtherance or in concealment of the alleged conspiracy. Thus, the Government's remarks with respect thereto are inappropriate and irrelevant.

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4. Overt acts (i) and (j) had to be proved in order to avoid the bar of the Statute of Limitations.

CONCLUSION

Petitioner respectfully renews his request that the Court review the concurrent sentence doctrine in the light of mootness as delineated by *Sibron* v. *New York*, supra, and the problem of adverse legal consequences as suggested by *Benton* v. *United States*, supra; that the conspiracy conviction be reversed as not comporting with *Grunewald* v. *United States*, supra, and its predecessors; and for such other and further relief as requested in the original Petition for Certiorari filed herein.

Respectfully submitted,

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